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JOSEPH F. SPANIOL, JR.
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No. 89-1770

(5)

In the Supreme Court of the United States
OCTOBER TERM, 1990

TELESTAR, INC.

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT
IN OPPOSITION

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QUESTION PRESENTED

Whether applications for a common carrier microwave communications system were properly denied by the Federal Communications Commission on the basis of the applicant's misrepresentations and lack of candor.



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OPINIONS BELOW

The decision of the court of appeals (Pet. App. 11-13) is unpublished, but the decision is noted at 886 F.2d 442 (Table). The decision of the Federal Communications Commission (Pet. App. 14-66) is reported at 3 FCC Rcd 2860.

JURISDICTION

The judgment of the court of appeals was entered on September 22, 1989. A petition for rehearing was denied on November 27, 1989. Pet. App. 7. The

petition for a writ of certiorari was filed on February 26, 1990 (corrected copy filed May 16, 1990). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

Under the Communications Act of 1934, 47 U.S.C. 151 *et seq.*, the responsibilities of the Federal Communications Commission include authorizing the construction and licensing of common carrier microwave communications systems. In this case, the Commission denied 15 applications by petitioner to construct such a system.

1. In January, 1985, petitioner filed 15 applications with the Federal Communications Commission for a common carrier microwave communications system to carry communications between Salt Lake City, Utah and Denver, Colorado. Shortly thereafter, an existing carrier, Western Tele-Communications, Inc. (WTCI) submitted a letter to the Commission alleging that petitioner had constructed most of its proposed facilities without first obtaining the Commission's authorization. Petitioner responded by admitting that it had already constructed substantial elements of its system. It asserted, however, that it had understood the Commission's rules to require Commission authorization only at the point when radio transmission equipment was installed. Petitioner submitted an affidavit from its president, Walter Stewart, stating that the information in its responsive pleading was true. 1 C.A. App. 1-38.

2. On June 21, 1985, the Chief of the FCC's Common Carrier Bureau, acting under delegated authority, issued a *Notice of Apparent Liability and Order Designating Applications for Hearing* (CC No. 85-202) [Designation Order]. 1 C.A. App. 141-150.

The order concluded that there were “substantial and material questions of fact concerning the circumstances surrounding the construction by [petitioner] and its subsequent application[s] to the Commission,” and designated issues to be addressed in a hearing. *Id.* at 147. The order noted that, even if petitioner had correctly read the FCC’s rules as requiring a permit only before the installation of radio transmission equipment, petitioner’s construction had progressed beyond that point before petitioner filed its applications. *Id.* at 145-146. The order specified that petitioner would have the responsibility of adducing evidence on the issues and of bearing “the burden of proof on the conclusory issues,” because of its “peculiar knowledge [of] the facts regarding the alleged misconduct.” *Id.* at 150 & n.19.

3. On September 20, 1985, before the hearing commenced, petitioner filed a Motion for Summary Decision. 2 C.A. App. 156-480. Petitioner argued that the *Designation Order* was based on a mistaken premise—that its explanation for the preconstruction was that it had read but misunderstood the FCC’s rules. *Id.* at 168-169. Attributing this explanation to its counsel, petitioner’s president now stated that he had not seen a copy of the Commission’s rules until shortly before he signed the applications and that even then he had only reviewed the technical aspects of the rules. *Id.* at 163-164, 188-189. Concerning the earlier affidavit by petitioner’s president attesting to the accuracy of petitioner’s first explanation, Walter Stewart now contended that he had signed that affidavit without ever seeing the underlying documents to whose accuracy he had purportedly attested. 3 C.A. App. 481. Petitioner now explained that its misunderstanding of the FCC’s rules was the result of informal discussions with frequency coordination

companies and equipment suppliers. 2 C.A. App. 162-163, 182-183.

4. The Administrative Law Judge (ALJ) denied petitioner's Motion for Summary Decision (3 C.A. App. 506-507), and, after holding four days of hearings, decided that petitioner's applications should be denied because petitioner was "not qualified to be a Commission licensee." *Id.* at 700. He determined that petitioner had engaged in premature construction (*id.* at 694); that petitioner had had knowledge of the Commission requirements (*id.* at 694-697); and that petitioner had engaged in misrepresentations and a lack of candor in its dealings with the Commission. *Id.* at 697-700.

5. In January 1987, the Commission's Review Board affirmed the ALJ's decision. 4 C.A. App. 887-901. The Board concluded that "the preponderance of the record evidence corroborates the ALJ's findings and conclusions for the proposition that [petitioner] has misrepresented material facts to the Commission and that its principals have demonstrated an egregious lack of candor with this agency in this proceeding." *Id.* at 887.

6. In December 1987, the Commission issued a decision in which it agreed with the Review Board and the ALJ on many matters, but remanded to allow petitioner to submit additional evidence. Pet. App. 74-109. The Commission first agreed that the burden of proof and of proceeding was on petitioner. The Commission noted that, under 47 U.S.C. 309(e), "'[t]he burden of proceeding with the introduction of evidence and the burden of proof shall be upon the applicant, except that with respect to any issue presented by a petition to deny or a petition to enlarge the issues, such burdens shall be as determined by the Commission.'" Pet. App. 82. The Commission

stated that the operative facts with respect to the issues in this proceeding were "peculiarly within the knowledge of [petitioner's] principals," and that the "burden is on [petitioner] to establish by a preponderance of the evidence both that it is qualified to be a licensee and that the public interest will be served by the grant of its applications." *Id.* at 83. The Commission also agreed that "on the face of the record [petitioner] does not appear to have met its burden of proof" (*id.* at 84) and that "the record does not establish [petitioner's] qualifications to be a licensee." *Id.* at 105.

The Commission remanded the proceeding to the ALJ to afford petitioner a further opportunity to meet its burden. Pet. App. 105-106. The Commission identified several specific areas where it felt additional evidence would be helpful. It noted, for example, petitioner's earlier claim that its principals were led to believe that they could lawfully undertake pre-permit construction as a result of discussions with frequency coordination companies and equipment suppliers. The Commission suggested that petitioner on remand should identify more specifically these alleged sources of its misunderstanding and present them as witnesses. Pet. App. 101. The Commission further pointed to a significant conflict between petitioner's principals and its former counsel concerning the date when these principals spoke with counsel about a possible premature construction problem. *Id.* at 102-105. Similarly, the Commission observed that the record contained information which petitioner had prepared for submission to its potential investors and which evidenced an understanding on petitioner's part of the FCC's construction permit requirements; the Commission noted that petitioner had not adequately reconciled this information with its subse-

quent claims that it misunderstood the requirements of the FCC's rules. *Id.* at 96-97.¹

7. On remand, petitioner chose not to supplement the existing record. Accordingly, in April 1988, the ALJ dismissed petitioner's applications for failure to prosecute. Pet. App. 67-73.

8. In May 1988, the Commission affirmed the denial of petitioner's applications. Pet. App. 14-66. The Commission noted that it had issued the remand order from an "abundance of caution" and "to allow [petitioner] an opportunity to establish its qualifications." *Id.* at 19-20. The Commission further observed that, "[a]lthough we specifically found that [petitioner] failed to establish its qualifications to be a licensee on the basis of the present record[,] [petitioner] refused to present further evidence." *Id.* at 20-21. The Commission thus evaluated the administrative record before it and concluded, "When consideration is given to the full record in this proceeding, the preponderance of the evidence establishes that [petitioner] has both misrepresented material facts and exhibited a lack of candor in its prosecution of these applications." *Id.* at 21-22.

9. On September 22, 1989, the D.C. Circuit affirmed the Commission's denial of petitioner's applications. In its unpublished order, the court stated:

The Commission's remand order warned [petitioner] that, as the record then stood, the FCC had "no basis to reverse the conclusion of both the ALJ and the Review Board that [petitioner] is unqualified to be a licensee." Despite that

¹ Petitioner's appendix omits Commissioner Dennis's dissent, in which she concluded that no remand was necessary and that petitioner's applications should simply be denied. See 4 C.A. App. 953-954.

warning, and the reasonableness of the Commission's assignment of the proof burden to the applicant when "the operative facts are peculiarly within the knowledge of [that party]," [petitioner] chose to stand on the existing record. Under the circumstances here presented, we have no cause to disturb the Commission's final order denying [petitioner's] applications.²

ARGUMENT

Petitioner raises three objections: (1) the court of appeals' order was erroneous (Pet. 52-54); (2) the Commission's proceedings and decision were unfair (Pet. 56-62); and (3) the court of appeals' decision conflicts with other decisions regarding exhaustion of administrative remedies. Pet. 62-63. None of these objections is well founded, and none warrants review.

1. Petitioner's challenge to the court of appeals' order is apparently based upon a fundamental misconception. Petitioner contends that the court of appeals "[f]ail[ed] to grant review [i]n this case" (Pet. 55) and that the alleged "cutoff of judicial review" (Pet. 54) was impermissible. This suggestion is incorrect. Petitioner's principal argument in the court below, *i.e.*, that the Commission improperly placed upon it the burden of "nonpersuasion," was explicitly considered and rejected by the court of appeals. See App., *infra*. The court explained that it was entirely reasonable for the Commission to assign the burden of proof to petitioner because "the operative facts are peculiarly within [its] knowledge." *Id.* at 2a. After carefully considering petitioner's ar-

² Petitioner's appendix (at 12) omits an important phrase from the last sentence in the quoted passage. We have reprinted the order in its entirety in an appendix, *infra*.

gements, the court found that it had "no cause to disturb" the Commission's decision, including its allocation of burdens. *Ibid.* Thus, although petitioner may disagree with the result reached by the court of appeals, any assertion that it was denied judicial review is clearly mistaken.

2. Petitioner also raises scattered objections to the Commission's administrative process. It maintains that settlement negotiations were unfair and abusive. Pet. 44-47, 59-60. Contrary to petitioner's suggestions, the conduct of what turned out to be unsuccessful settlement negotiations in the presence of the FCC staff did not taint the administrative process, and the Commission did not punish petitioner for failing to agree to a negotiated settlement; the Commission rendered a decision in this case on the basis of the evidence in the record. Similarly, petitioner repeatedly points to positions taken by the FCC Common Carrier Bureau (Pet. 25, 39-40, 56); the recommendations of the FCC Common Carrier Bureau obviously were not binding on the ALJ, the Review Board, and the Commission, and did not foreclose their own evaluations of the record. Finally, petitioner repeatedly focuses on the FCC's decisions, in entirely separate proceedings, not to revoke the authorizations of MCI Telecommunications Corporation (Pet. 1-13, 57-58) and WTCI (Pet. 14-15, 49, 57-58).³ The propriety of these other decisions, of course,

³ In the MCI matter, petitioner filed two petitions with the FCC to revoke MCI's licenses to operate certain common carrier microwave facilities on the ground that MCI had prematurely constructed some of its facilities prior to obtaining ~~FCC~~ approval. The Commission concluded that MCI had indeed prematurely constructed some of its facilities and it imposed a monetary forfeiture of \$10,000 on MCI. *MCI Telecommunications Corp.*, 3 FCC Rcd 509, supplemented by 4

is not properly presented by this case, in which the Commission rejected petitioner's applications. To the extent that petitioner argues that the Commission's decision in this case was unfair because it treated petitioner more harshly than WTCI and MCI, it should be pointed out that, in the other proceedings, the Commission specifically held that there was no evidence that either WTCI or MCI had engaged in misrepresentation or a lack of candor in their explanations to the Commission. See *Western Tele-Communications, Inc.*, 3 FCC Rcd at 6405-6406; *MCI Telecommunications Corp.*, 3 FCC Rcd at 514. This difference from the Commission's finding with respect to petitioner's misrepresentation and lack of candor is clearly sufficient to distinguish those decisions.

3. Finally, petitioner's contention (Pet. 62-63) that the court of appeals' order conflicts with decisions from this Court and the Ninth Circuit regarding the exhaustion of administrative remedies is without merit. The basis of the alleged conflict is not clearly set forth in the petition, but petitioner apparently believes that the court of appeals concluded that petitioner had failed to exhaust administrative remedies. Pet. 62. In fact, neither the court of appeals decision nor the Commission order which it

FCC Rcd 7299 (1988). See also 3 FCC Rcd 3155, reconsideration denied, 3 FCC Rcd 6732 (1988). In the WTCI matter, similar charges were filed by petitioner, but the Commission found no evidence to support petitioner's claim of impermissible premature construction. *Western Tele-Communications, Inc.*, 3 FCC Rcd 6405 (1988). Petitioner appealed the denial of its petitions to the D.C. Circuit. In unpublished judgments, the court dismissed petitioner's appeals for lack of standing. *TeleSTAR, Inc. v. FCC*, 901 F.2d 1131 (D.C. Cir. 1990) (Table); *TeleSTAR, Inc. v. FCC*, 899 F.2d 1268 (D.C. Cir. 1990) (Table).

affirms relies upon, or even mentions, the exhaustion doctrine. Instead, petitioner's applications were rejected because, on the state of the hearing record, the preponderance of the evidence established that petitioner engaged in misrepresentations and lack of candor in its dealings with the Commission. Pet. App. 21-22.⁴ The significance of petitioner's failure to submit additional evidence was that, as the Commission had explicitly warned, it left the administrative record in a state on which petitioner could not possibly prevail. Thus the court of appeals' order clearly presents no conflict with any decision of this Court or any other court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

JOHN G. ROBERTS, JR.
*Acting Solicitor General **

ROBERT L. PETTIT
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Federal Communications Commission

JULY 1990

⁴ It is well settled that misrepresentation and lack of candor justify the Commission's denial of a license. *FCC v. WOKO, Inc.*, 329 U.S. 223 (1946); *RKO General, Inc. v. FCC*, 670 F.2d 215 (D.C. Cir. 1981), cert. denied, 456 U.S. 927 (1982). The integrity of the Commission's processes rests on its ability to rely upon the representations of its licensees. *RKO General, Inc. v. FCC*, 670 F.2d at 231.

* The Solicitor General is disqualified in this case.

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 88-1420, 88-1445

TELESTAR, INC., APPELLANT

v.

FEDERAL COMMUNICATIONS COMMISSION

MCI TELECOMMUNICATIONS CORPORATION,
WESTERN TELE-COMMUNICATIONS, INC., INTERVENORS

Appeal from an Order of the
Federal Communications Commission

[Filed Sept. 22, 1989]

JUDGMENT

Before: MIKVA, EDWARDS, and RUTH B. GINSBURG,
Circuit Judges.

This appeal was considered on the record from the
Federal Communications Commission and on the
briefs and oral arguments of counsel. Upon full re-
view, the court is satisfied that appropriate disposi-
tion of the case does not warrant a published opinion.
See D.C. Cir. R. 14(c).

(1a)

The Commission's remand order warned TeleSTAR that, as the record then stood, the FCC had "no basis to reverse the conclusion of both the ALJ and the Review Board that TeleSTAR is unqualified to be a licensee." Despite that warning, and the reasonableness of the Commission's assignment of the proof burden to the applicant when "the operative facts are peculiarly within the knowledge of [that party]," TeleSTAR chose to stand on the existing record. Under the circumstances here presented, we have no cause to disturb the Commission's final order denying TeleSTAR's applications. It is therefore

ORDERED and **ADJUDGED** that the order from which this appeal has been taken be affirmed.

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. *See* D.C. Cir. R. 15(b)(2).

Per Curiam

For the Court:

/s/ Constance L. Dupre
CONSTANCE L. DUPRE
Clerk